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**STATE OF VERMONT**
**DEPARTMENT OF PUBLIC SERVICE**



November 12, 1998

Office of the Secretary
Federal Communications Commission
1919 M Street NW
Suite 222
Washington, DC 20554

Re: CC Docket No. 98-170; FCC 98-232
Comments of the Vermont Public Service Board and
Vermont Department of Public Service

Dear Mr./Ms. Secretary:

Enclosed for filing with the FCC in the above-referenced proceeding is a copy of the joint comments of the Vermont Public Service Board and the Vermont Department of Public Service. I have served copies of these comments on the attached service list.



Sincerely,

Leslie A. Cadwell
Special Counsel

cc: David Farnsworth



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**Before the**
**Federal Communications Commission**
Washington, D.C. 20554



| | | |
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| In the Matter of Truth in Billing and Billing Format | ) | CC Docket No. 98-170 |



**COMMENTS OF THE VERMONT PUBLIC SERVICE BOARD AND VERMONT DEPARTMENT OF PUBLIC SERVICE**

November 12, 1998

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## Introduction

The Vermont Public Service Board and the Vermont Department of Public Service, respectively, Vermont's public utility commission and public advocate for utility matters (hereinafter "Vermont," "Board and Department" or "We") welcome this opportunity to comment on making telephone bills more readable and accurate to enable consumers to make informed choices in a competitive telecommunications marketplace. Because today's telecommunications market requires a telephone bill that reflects the profusion of services that are available from a multitude of providers, the need for telephone bills to provide necessary information in a manner that allows consumers to take full advantage of the benefits of competition while also empowering them to protect themselves from unscrupulous providers is greater than ever. The comments below contain a discussion of legal authority and suggested guidelines and proposals for assuring consumers of the necessary information to protect themselves from fraudulent or deceptive practices and to make informed choices about telecommunications services and their providers.

### I. THE COMMISSION SHOULD CONCLUDE THAT ITS AUTHORITY UNDER 47 U.S.C. § 201 IS VERY BROAD AND THAT, CONSISTENT WITH THE FIRST AMENDMENT TO THE U.S. CONSTITUTION, THE COMMISSION CAN IMPOSE MINIMUM INFORMATION AND BILL FORMAT REQUIREMENTS ON TELECOMMUNICATIONS PROVIDERS.

Commission jurisdiction can and should complement that of the states and other agencies whose roles are to protect telecommunications consumers. Many states and their public utility commissions have or are developing requirements designed to protect their consumers from abuses associated with questionable informational and billing practices.[1] The Commission's proposals set forth in this NPRM are a valuable starting point for an effective and coordinated federal and state

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[1] *See, e.g.*, Public Service Board Docket 5903, Investigation into Service Quality Standards, Privacy Protections, and other Consumer Safeguards for Retail Telecommunications Service, Order of July 31, 1996; New England States' Draft, Model Rule Basic Consumer Protections for Intrastate Interexchange Telephone Carriers.

consumer protection regime that can provide consumers with information necessary to allow them to obtain the benefits of an increasingly competitive telecommunications marketplace.

The Commission has jurisdiction to focus in this proceeding on (1) the relationship between carriers and their end-use customers, (2) carriers' provisioning of marketing materials prior to service initiation, and (3) carriers' telephone billing practices.[2] Consistent with the First Amendment to the U.S. Constitution, the Commission's authority under 47 U.S.C. § 201(b) is very broad. All carriers are obliged to have charges, practices, and classifications that can be deemed just and reasonable pursuant to 47 U.S.C. § 201(b).[3]

Marketing materials and the telephone bill are integral to the relationship between a carrier and its customer. The manner in which charges are identified and articulated is essential to the consumer's understanding of the services that will be or have been rendered. Thus, a carrier's provision of deceptive or even misleading billing information should constitute an unjust and unreasonable practice in violation of § 201(b) of the Act.

The following comments in this section will address the broader First Amendment question as it applies to both the provisioning of marketing materials prior to service initiation and to company bills.[4]

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[2] The focus in these comments will be on the relationship between a provider and its retail consumers and not on providers and wholesale purchasers of telecommunications services, a relationship considered in *AT&T v. Central Office Telephone, Inc.*, 118 S.Ct. 1956 (1998) (J. Stephens dissenting).

[3] This conclusion is correct even if the Commission finds that it is not the Commission's role to develop comprehensive billing and customer information regulations, as occurred with non-dominant interexchange carriers' tariff requirements. In response to the assertion that the resale market will not survive in the absence of continued tariffing requirements, the Commission concluded that its "decision to forbear from requiring nondominant interexchange carriers to file tariffs for interstate, domestic, interexchange services will not affect such carriers obligations under Sections 201 and 202 to charge rates, and to impose practices, classifications and regulations, that are just and reasonable and not unjustly or unreasonably discriminatory." FCC 96-424, CC Docket No. 96-61, Second Report and Order, October 29, 1996 (Commissioner Chong issuing a separate statement) at ¶ 29.

[4] The comments on the First Amendment are focused upon Commission rules but apply equally to similar state commission efforts.

**First Amendment: Background**

The Commission's imposition of minimum information and bill format requirements (hereinafter "minimum requirements") on telecommunications providers will restrict, to a degree, companies' First Amendment rights to speak or to refrain from speaking in their interests.[5] The Supreme Court has never spoken directly on this point, but because it concerns commercial speech, the test developed in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, is the test the Court would most likely apply to determine the constitutionality of such standards.[6]

*Central Hudson* contains the framework for deciding when commercial speech is protected under the First Amendment.[7] The four part *Central Hudson* test begins with determining whether the speech concerns an unlawful activity or is misleading.[8] If it is, then the analysis is complete and protection is not extended; if it is not, however, the government's interest in regulating the speech must be analyzed. The analysis consists of three additional questions: (1) is the government's interest substantial; (2) does the regulation directly advance the interest; and (3) is the regulation more extensive than is necessary?[9]

In analyzing the New York law, the Court found that the speech being regulated was neither misleading nor otherwise unlawful.[10] In analyzing the governmental interest involved (criterion two)

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[5] *See generally*, Kathleen Lennon, Comment, Government's Udder Disregard for a Consumer's Right to Information on RBST: Mandatory Labeling of Milk Products Should be Allowed, 22 Vt. L. Rev. 433 (1997) (hereinafter "Lennon").

[6] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). *See also 44 Liquormart v. Rhode Island,*, 116 S. Ct. 1495 (1996) (plurality opinion).

[7] The case grew from a challenge to a New York Public Service Commission ban on promotional advertising by electric utilities. The ban was intended as a response to a fuel shortage for the winter of 1973-74. Reasoning that promoting energy sales would be against the national policy to conserve energy, the N.Y. Commission sought to ban advertising that would "stimulate the purchase of utility services." *Central Hudson*, 447 U.S. at 559.

[8] *Id.* at 566. Because false or misleading speech is of no use to consumers, First Amendment protection does not extend to it.

[9] *Id.*

[10] *Id.*

the Court agreed with the State that there was a substantial governmental interest in energy conservation.[11] The Court found that the third criterion was also met because the New York law directly advanced the substantial state interest of energy conservation.[12] However, the Court found that the fourth element required New York to demonstrate that energy conservation could not be accomplished through a less speech-restrictive means than a total ban on promotional advertising.[13] The Court concluded that the New York law was unconstitutional because New York had not considered the least restrictive means possible.[14] Consequently, after *Central Hudson*, a regulatory authority that intends to burden commercial speech must demonstrate that no other alternatives will accomplish the government's interests.

More recently, in *44 Liquormart v. Rhode Island,* the Supreme Court continued the trend towards greater protection of commercial speech.[15] In this case the Court found that the State of Rhode Island was unable to justify a complete ban on price advertisement for liquor.[16] As one commentator on the case has remarked, "[a]lthough the Court was unanimous in its decision, a majority of Justices could not agree on the rationale behind declaring the law unconstitutional; therefore it is difficult to determine how the Court will decide its next commercial speech case."[17] However, in its decision, the Court reiterated the fundamental importance of commercial information:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that

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[11] *Id.*

[12] *Id.* at 569.

[13] *Id.* at 569-70.

[14] *Id.* at 570. The Court's conclusion was due to the state not making a showing "that a more limited restriction on the content of promotional advertising would not serve adequately the state's interests." *Id.*

[15] *44 Liquormart v. Rhode Island,* 116 S. Ct. 1495 (1996) (plurality opinion).

[16] *Id.* at 1503.

[17] Lennon, *supra* at 455.

> those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[18]

**The Proposed Regulations**

The Commission's imposition of minimum requirements on telecommunications providers can be effective and still pass First Amendment scrutiny under the *Central Hudson* test. First, a Commission rule imposing minimum standards will meet the first element of the test because the speech to be regulated, i.e., advertisement and bill content and format does not necessarily involve an unlawful activity or misleading information.[19] The rule would require truthful and non-misleading commercial information about telecommunications providers and services.

Second, the Commission has a substantial interest in mandating minimum requirements to provide the public with information necessary to make informed decisions. The Commission has always been concerned with consumer protection. It also continues to be a matter of public interest that commercial decisions related to telecommunications, in the aggregate, be intelligent and well informed. Commission leadership in this area would also promote uniformity in the marketing standards of these products which are available nationwide, thereby creating a less imposing regulatory environment. Further, the putative benefits of competition, including lower prices and greater variety of services, are more likely to be realized if consumers, in general, are not skeptical and tentative, but rather if they are informed and active in the market.

Third, the Commission's minimum requirements will directly advance its interest in protecting consumers through the promotion of adequate rather than misleading commercial information.

Fourth, whether less restrictive means exist to further the Commission's interest presents a challenge. The plurality in *44 Liquormart* stated that it is "perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the

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[18] *See 44 Liquormart*, 116 S. Ct. at 1504-05 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)).

[19] Of course, to the extent that the information provided to consumers is misleading, these First Amendment questions are not implicated and no Constitutional protections apply.

State's goal."[20] Comments and responses to this NPRM may provide sufficient evidence to demonstrate that there are no other less-restrictive means of assuring that customers obtain appropriate information and that companies will not mislead them. If the Commission could assure that customers can be protected in a manner that would not infringe on telecommunications providers' right to speak, those alternative measures would have to be adopted. On the other hand, it should be noted that *44 Liquormart* and *Central Hudson* involved total bans on speech; the Commission's minimum requirements in this context would not. Furthermore, the Court in *44 Liquormart* struck down the Rhode Island ban due to the importance the Court placed on consumers' ability to make informed decisions, which is precisely the interest the Commission advances here.

In conclusion, to promote intelligent and well-informed decisions by telecommunications consumers, the Commission can impose on telecommunications providers minimum information and bill format requirements which do not violate protections assured by the First Amendment.

## II. THE COMMISSION SHOULD ADOPT MINIMUM INFORMATION AND BILL FORMAT REQUIREMENTS THAT WILL ENSURE INFORMED CONSUMER CHOICE

### Billing Principles: Introduction

As the Commission has noted, today's telecommunications market requires a telephone bill that reflects a profusion of services available from a multitude of providers. In this context, telecommunications companies have started to include on their customers' bills line item charges which purport to identify the costs incurred on behalf of the customer in obtaining access to local exchange company networks and in meeting company universal service obligations. Both the Commission and state regulators have received literally thousands of complaints and inquiries from consumers suggesting that many consumers are confused about the nature of these charges. The Board and Department believe that there are reasonable solutions to this problem and urge the Commission to take a hard look especially at the practice of including certain line-item charges on customer bills.

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[20] *44 Liquormart*, 116 S. Ct. at 1510.

The comments in this section are divided into two parts. First, the Board and Department believe that it is inappropriate for companies to include any cost-of-service items in a customer's bill. We consider the practice misleading and ultimately an impediment to the Commission's efforts to ensure that customers receive appropriate and helpful information on prices and terms. In the event the Commission disagrees and concludes that these various charges can be itemized on customer bills, then the second part of our comments will suggest how best to characterize and present these company costs.

**Part One: Customer Bills Should Contain Only Customer-Created Costs**

The Board and Department agree with the Commission that appropriately-formatted telephone bills can provide information in a manner that allows consumers to take full advantage of the benefits of telecommunications competition while also empowering them to protect themselves from unscrupulous providers. To this end, we would argue that there is one rule that the Commission should observe in implementing its guidelines for bill formats. Simply put, bills should reflect only the costs that the customers themselves create.

In observing this rule, the Commission can assure customers that their bills will provide them with information about their behavior and about the costs that their actions cause. Consequently, customers will be in a better position to make informed choices about telecommunications services and providers.

Conversely, it is inappropriate for bills to include other charges that erroneously lead a customer to believe that he or she caused these costs. Whether the costs are regulatory[21] or are market-driven in nature, it is improper to give customers the impression that their costs are created by their actions when that is not the case. Allowing companies this opportunity amounts to granting

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[21] This is not to say that no regulatory charges should be included in a customer's bill. Certainly where a regulatory requirement involves an end-user charge and is directly attributable to the customer, it would be appropriate to include it as a line item in a bill. For example, the state universal service charge in Vermont is applied to all retail telecommunications service and takes the form of a "charge . . . imposed on the person purchasing the service." 30 V.S.A. § 7521(a). The bill states explicitly what percentage of the purchased service the charge is. Sales tax, is another example of a government-imposed cost that is ascertainable and directly attributable to a customer's actions.

them a license to confuse an otherwise clear pricing signal.[22] This behavior is misleading, and, in practice, it will impede the Commission's goal of getting appropriate information to consumers.

**Part Two: Cost-of-Service Line Items on Customer Bills**

Rather than establish "safe harbor" language, the Commission should develop a set of standards that carriers' line item descriptions should meet.[23] These requirements should ensure that companies do not mislead customers into believing that the recovery of an assessment must be passed on directly to the customer. Companies must also be required to provide complete, accurate, and understandable information regarding the basis for these new charges and for their amounts.[24] These requirements should:

- Meet applicable federal or state tariff filing and rate regulation requirements.[25]

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[22] For example, in the case of federal universal service requirements, the Commission assesses portions of the universal service charge on IXCs in direct proportion of their total revenues, including intrastate, interstate, and international calls. The IXC's tariff assesses its interstate customers the federal universal service payments in proportion to its customers' total bills (including intrastate, interstate, and international calls). The relationship between the company's total revenues and a customer's total bill is neither immediately clear nor is it explained.

[23] The adoption by the Commission of "safe harbor" language could arguably create a situation in which no states could impose any more stringent, *i.e.*, conflicting, conditions on bill language. This would create unnecessary conflict between the Commission and the states.

[24] As the Commission has indicated, even when certain charges are included, they are often inaccurately identified, and the descriptions for some charges even imply that such charges have been imposed directly on consumers by federal law. Moreover, the amount of these charges for a particular customer may not correspond to the actual costs to the carrier of universal service support and access charges attributable to that customer.

[25] In large measure, states will be the only ones to impose requirements. *See e.g.*, New England States Draft, Model Rule Basic Consumer Protections for Intrastate Interexchange Telephone Carriers. Federal law formerly required IXCs to charge customers the charges set out in the Commission Tariff and specifically prohibited any deviation from those charges. 47 U.S.C. § 203(c). In October 1996, the Commission released the IXC Tariff Forbearance Order in which the Commission determined that it would no longer require or allow nondominant interexchange carriers to file tariffs pursuant to § 203 for interstate, domestic interexchange services. Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, Second Report and Order, FCC 96-424 (Nov. 22, 1996).

• Avoid suggesting that the charge is a government charge or tax on the customer or that the amount of the charge on the customer is fixed by law or government action.

• Include a separate notice to the customer where the charge on the customer's bill is, or might be, larger than the amount of the cost that the carrier incurred or will incur. That separate notice should include a description of the scope and purpose of the separate line item including, for example, information such as an explanation of the net reduction in the providers' costs of providing long distance service due to the change in access charges.

## III. THE COMMISSION SHOULD ADOPT SPECIFIC MINIMUM STANDARDS FOR BILLING FORMAT AND SHOULD EXPLICITLY ACKNOWLEDGE THAT THE STATES HAVE JURISDICTION TO ADOPT COMPLEMENTARY, BUT NOT CONFLICTING, STANDARDS FOR BILLING FORMAT.

Many of the specific billing format proposals contained in this NPRM will, if adopted, provide effective assistance to consumers in understanding their bills and making informed choices. The following section addresses several of the proposals advanced by the Commission for comment.

In supporting adoption of these proposals, the Board and Department also urge the Commission to avoid the jurisdictional issues that have previously arisen in the area of slamming by explicitly stating that states are not preempted from establishing billing-related rules which require disclosure of more or different information, as long as state rules do not conflict with the Commission's rules.[26] Such action will help avoid future litigation as states continue to address pressing consumer protection issues related to billing, and will recognize that both federal and state resources are needed to cope with the growing complexities and challenges posed by competition.

### Organization of the bill

The Commission should require organization of telecommunications bills in a form which is readable and which enables consumers to identify the amount they must pay for each category of service. Currently, consumers often pay erroneous or unauthorized charges for months before

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[26] *E.g.*, *see* note 23 and accompanying text above.

realizing there is a problem with their bills. Even the best informed consumer has difficulty deciphering many companies' billing formats. Segregating the bill into major categories of service, such as local, intra-lata toll, long distance, and miscellaneous services, will potentially improve understandability. However, the overlay of multiple service providers' billing within each category may make such an approach unworkably complex. While we believe it is desirable for consumers to be able to analyze all charges for a given service within one section of the bill, any rule or format adopted must take into account the complexity created by multiple provider billing within each category of service.

We believe that the inherent complexity of the bill organization can be offset by a one-page summary on each bill listing presubscribed carriers (local, toll and long distance), other service providers and PIC freezes in effect. In addition, we recommend the billing summary list in plain language any miscellaneous services included within the bill. The summary can be an effective means of providing clear and conspicuous notice of status changes. Such notice should include not only new companies present on the bill for the first time, but also changes in rates due to price increases or reclassification of the customer's billing status (e.g., from rate plan to casual billing). Unheralded changes in areas such as billing classification and price increases are a major source of consumer frustration reported to state regulatory agencies.

The format of a billing summary should be standardized in a manner similar to the standardization of nutritional labels. That is, the format should be clear and fixed so that consumers have an opportunity to learn to read the information provided and not be required to readjust when changing carriers.

**Description of Services and Identification of Providers**

We support the itemization proposed by NARUC and the National Consumers League. Such plain language and itemized descriptions of services rendered is necessary to assist consumers in understanding the components of and charges on their telephone bills. Consumers need to know the date, time, duration, and the number called. In addition, if the charge represents a service, that service should also have a brief, clear, plain language description. Such services might include custom calling features, voice mail, directory charges, pay-per-call information services as well as

many others. We believe that this requirement should apply to any billing done on the telephone bill, including services that utilize international numbers.

The Commission should adopt a requirement that the bill show the name of the service provider rather than, or in addition to, a billing aggregator. In the case of long distance resellers, the Commission should require the reseller's name to be displayed, and not the facilities-based carrier whose services are being resold. Consumer complaints have demonstrated clearly that the lack of information concerning the actual service provider makes it very difficult for consumers to identify who is providing any given service, and increases the challenge of informally resolving disputed charges. The absence of a requirement for clear identification of the responsible company impedes consumers from learning quickly that they have been "slammed" and then complicates the process of undoing the harm. Additionally, a toll-free number must be provided for each service provider to facilitate contact by a consumer who might have questions.

We support a requirement that telephone bills differentiate between "deniable" and "non-deniable" charges on the bill. We believe that telephone bills should distinguish between charges that, if not paid, will result in disconnection of local service and those that will not. Such charges could be labeled on each provider's section of the bill and on the summary page of the bill. The Commission's order concerning Universal Service[27] envisions an environment where common carriers utilize traditional means of collections for unpaid bills. Similarly, it is misleading — yet, at present a common practice — for carriers to use the threat of disconnection as a means of inducing payment, even in cases where a disconnection is not permitted. In implementing the Commission's order on Universal Service, the states are facing significant conflict with carriers not presently willing or able to carry out multiple balance billing, and therefore, threatening low income consumers with disconnection for non-disconnectable charges. A Commission ruling which prohibits such misleading practices on all bills will further benefit the implementation of the Universal Service order.

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[27] *See, e.g.*, FCC 97-157, CC Docket No. 96-45, Report and Order, May 7, 1997 at ¶ 394 where the Commission stated that toll carriers have the "ability to collect their bills using all methods available to any other creditor."

In addition, we support use of the readily understandable language "disconnectable and non-disconnectable" for further clarity by consumers. If the language used is "disconnectable and non-disconnectable charges," (rather than the less widely understood "deniable and non-deniable") a statement similar to those currently used with pay-per-call services would be helpful to consumers.

**Provision of Consumer Inquiry/Complaint Information**

We support a requirement that telephone bills show not only the billing agent, but also the actual service provider. A mailing address should also be included for the service provider. A problem associated with some carriers' toll-free numbers is the rate or consistency with which calls to those numbers are answered. If consumers can never get an answer, are always put on hold when they call, or are repeatedly disconnected, then the availability of a toll-free number is not meaningful.

A requirement that telephone bills include the name of each service provider, a business address and a toll-free number we believe will enable consumers to initiate action to resolve complaints. In addition, the frequency of consumer complaints concerning information provided verbally in the sales and customer service processes suggests a need to extend "truth-in-billing" requirements to the proper training of customer service and sales representatives.

**Conclusion**

The Commission should conclude that its authority under 47 U.S.C. § 201 is very broad and that, consistent with the First Amendment to the U.S. Constitution, the Commission can impose minimum information and bill format requirements on telecommunications providers. The Commission should adopt minimum information and bill format requirements that will ensure informed consumer choice. Finally, the Commission should adopt specific minimum standards for billing format and should explicitly acknowledge that the states have jurisdiction to adopt complementary, but not conflicting, standards for billing format.

Respectfully submitted,

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November 12, 1998

Certificate of Service

I, Leslie A. Cadwell, hereby certify that on this 12th day of June, 1998, copies of the foregoing comments of the state of Vermont Public Service Board and Department of Public Service were also served by first class mail, postage prepaid, to the following persons.

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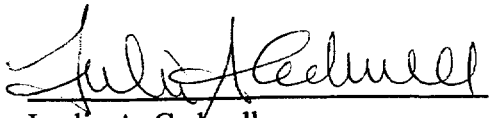

Leslie A. Cadwell
Dated: November 12, 1998